The Bronx Household of Faith: Looking at the Unanswered Questions

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THE BRONX HOUSEHOLD OF FAITH: LOOKING AT THE UNANSWERED QUESTIONS

In Bronx Household of Faith v. Board of Education of the City of New York (Bronx Household II), the Second Circuit Court of Appeals recognized that "[t]he American experiment has flourished largely free of the religious strife that has stricken other societies because church and state have respected each other's autonomy." Additionally, the American experiment has flourished in a general sense because it allows for a "marketplace of ideas" through the free expression and debate of thoughts and viewpoints. In recent years, both of these notions have been tested and redefined through the legal process—a process that has generated many unanswered questions and produced substantial conflicts in the judicial system. Specifically, appellate courts throughout the United States have differed on the question of whether "speech can be excluded from a limited public forum on the basis of the religious nature of the speech." In the wake of this conflict, courts have left the American people with important questions regarding the relationship between church and state and permissible limitations on religious speech in public fora.

Nowhere has the balance between free expression and separation of church and state become more tenuous than in the public school setting.

2. Id. at 355.
4. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 105-06 (2001); compare Gentila v. Tucson, 244 F.3d 1065 (9th Cir. 2001) (en banc) (holding that a city properly refused National Day of Prayer organizers' application to the city's civic events fund for coverage of costs for city services), Campbell v. St. Tammany's Sch. Bd., 206 F.3d 482 (5th Cir. 2000) (holding that a school's policy against permitting religious instruction in its limited public forum did not constitute viewpoint discrimination), and Bronx Household of Faith v. Cnty, Sch. Dist. No. 10 (Bronx Household I), 127 F.3d 207 (2d Cir. 1997) (concluding that a ban on religious services and instruction in the limited public forum was constitutional), with Church on the Rock v. Albuquerque, 84 F.3d 1273 (10th Cir. 1996) (holding that a city's denial of permission to show the film Jesus in a senior center was unconstitutional viewpoint discrimination), and Good News/Good Sports Club v. Sch. Dist., 28 F.3d 1501 (8th Cir. 1994) (holding unconstitutional a school use policy that prohibited Good News Club from meeting during times when the Boy Scouts could meet).
In 2001, the Supreme Court’s decision in *Good News Club v. Milford Central School* attempted to clarify some of the conflicts between appellate courts on this issue by holding that restrictions in a limited public forum against an organization with a religious viewpoint violated the First Amendment’s Free Speech clause. In spite of the Supreme Court’s attempt, the Second Circuit’s opinion in *Bronx Household II*, which relied principally on reasoning in the *Good News Club* decision, shows that many important issues remain unresolved, particularly whether a court could ever “identify a form of religious worship that is divorced from the teaching of moral values” and whether “the state, without imposing its own views on religion, [could] define which values are morally acceptable and which are not.” How the Supreme Court chooses to resolve these questions in the future will “no doubt have profound implications for relations between church and state.”

Part I of this article discusses the three fora of expression recognized by the United States Supreme Court and the standards governing restrictions on speech in each type. Part II traces some of the Supreme Court’s precedents regarding use of school property for religious purposes and presentation of religious viewpoints. Part III discusses and analyzes the principal unresolved issue identified by the *Bronx Household II* court that remains after the Supreme Court’s decision in *Good News Club*, namely whether courts may draw a permissible distinction between religious viewpoint and religious worship in a limited public forum. This section concludes by arguing that, in the wake of *Good News Club*, the *Bronx Household II* opinion shows that a court’s ability to identify a form of “religious worship, divorced from any teaching of moral values,” and thus permit its exclusion from a limited public forum, is both unlikely and potentially problematic in practical application.

### I. Types of Expressive Fora

The First Amendment guarantees individuals the right to express ideas and thoughts while on public property—even when the expression

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5. *Good News Club*, 533 U.S. at 120.
8. *Bronx Household II*, 331 F.3d at 354.
is religious in nature. Expression, however, may occasionally be limited by the government who, like a private property owner, may regulate speech and preserve property for the use to which it is dedicated. Whether a particular restriction on speech or activity is permissible depends on the nature of the forum where the expressive activity takes place. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Supreme Court set forth three types of expressive fora and explained the standards for regulation of speech in each of them.

### A. Traditional Public Forum

The first category of public property where expression may take place is the traditional public forum. Traditional public fora include property such as “streets, parks, and places that ‘by long tradition . . . have been devoted to assembly and debate.’” In a traditional public forum, the government may occasionally restrict speech based on its subject matter, but such regulations are “subject to the highest scrutiny” and “survive only if they are narrowly drawn to achieve a compelling state interest.” Restrictions on viewpoint are never constitutional in this type of forum.

### B. Limited Public Forum

The second category of public property is a limited public forum. The government creates a limited public forum when it intentionally designates “a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the..."
In a limited public forum, the government may permissibly reserve the forum for certain speakers and topics; however, any restrictions on speech may not discriminate on the basis of viewpoint and must be reasonable in light of the purpose of the forum.\(^{18}\) Governmental limitations on use of the forum are subject only to minimal constitutional scrutiny when the proposed uses fall outside of the purposes of the limited forum.\(^{19}\) To determine whether a limited public forum exists, courts generally look to policy, practice, and the nature of the property at issue.\(^{20}\)

C. Nonpublic Forum

The third and final category of public property is the nonpublic forum. A nonpublic forum is state-owned property that "has not been opened for public speech either by tradition or by designation."\(^{21}\) In this type of forum, the government may restrict access "on the basis of subject matter and speaker identity."\(^{22}\)

II. SUPREME COURT DECISIONS DISCUSSING RELIGIOUS SPEECH IN A PUBLIC SCHOOL SETTING

The Supreme Court has encountered several cases that illustrate the difficulty in developing methods and rules for distinguishing between religious worship and religious viewpoint. Without clear guidelines, it is difficult for schools, particularly schools characterized as providing limited public forums, to assess whether their actions are in violation of the Establishment Clause of the First Amendment.

A. Widmar v. Vincent

*Widmar v. Vincent*,\(^{23}\) a 1981 opinion, was the first United States Supreme Court case involving access to school facilities by religious groups.\(^{24}\) In that case, the University of Missouri at Kansas City granted
permission for over one hundred student clubs, including a religious group named Cornerstone, to conduct club meetings in school facilities. After four years of allowing the club to meet on campus, the university revoked Cornerstone's permission to use school facilities pursuant to a regulation that prohibited the use of university buildings "for purposes of religious worship or religious teaching." The district court upheld the regulation, finding that "it was not only justified, but required" by the Establishment Clause of the Constitution.

The Eighth Circuit reversed the district court and held that the regulation was an impermissible content-based restriction against religious speech, which the university failed to justify by compelling means. The court also held that the Establishment Clause is not offended by allowing a religious group to meet on a university campus when facilities are open to a wide variety of groups and speakers. To the contrary, the primary effect of an equal-access policy would not advance religion, but would further students' intellectual curiosity and social awareness.

The United States Supreme Court affirmed the Eighth Circuit, reasoning that the university had created a forum generally open to student groups. Having done so, it was required to justify its exclusion of a student group that wished to engage in religious worship and discussion by a compelling state interest. The court described the State's asserted interest in preventing an Establishment Clause violation as possibly "compelling," but ultimately concluded, after applying the Lemon test, that an equal access policy would not offend the Establishment Clause. Since the university opened its facilities to a

25. Widmar, 454 U.S. at 265.
27. Id. at 263; Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979).
28. Chess v. Widmar, 635 F.2d 1310, 1316 (8th Cir. 1980).
29. Id. at 1317.
31. Widmar, 454 U.S. at 269.
32. Id. at 270.
33. Id. at 271; see also Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Lemon Test requires that: (1) "the statute must have a secular legislative purpose," Id. at 612; (2) "its principal or primary effect must be one that neither advances nor inhibits religion," Id. (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)); and (3) "[i]t must not foster 'an excessive government
A wide variety of student groups, it could not exclude certain groups solely because of the content of their speech.\textsuperscript{34} The court eventually held that the State’s asserted interest in preventing an Establishment Clause violation was not sufficiently compelling to justify its content-based discrimination.\textsuperscript{35}

\textbf{B. Lamb’s Chapel v. Center Moriches Union Free School District}

In \textit{Lamb’s Chapel v. Center Moriches Union Free School District,}\textsuperscript{36} the Supreme Court was faced with the issue of whether it was a violation of “the Free Speech Clause of the First Amendment . . . to deny a church access to school premises to exhibit for . . . assertedly religious purposes, a film series dealing with family and child rearing issues.”\textsuperscript{37} In this case, the local school board adopted a regulation allowing outside groups to use school facilities for social, civic, or recreational uses, but not for “religious purposes.”\textsuperscript{38} Lamb’s Chapel, a local church, sought to use school facilities to show a film series about child rearing from a Christian perspective.\textsuperscript{39}

The district court characterized the school’s facilities as a limited public forum\textsuperscript{40} and stated that once this type of forum is opened to a particular type of speech, “selectively denying access to other activities of the same genre is forbidden.”\textsuperscript{41} However, because the school district here had never opened its facilities for religious purposes, the denial was viewpoint neutral and did not violate the Free Speech Clause.\textsuperscript{42} The Second Circuit affirmed “in all respects.”\textsuperscript{43}

The United States Supreme Court recognized that the government can regulate subject matter and speaker identity on public property designated as a limited public forum “so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”\textsuperscript{44} The Supreme Court reversed the district court and

\begin{footnotes}
\item[34.] \textit{Widmar}, 454 U.S. at 273.
\item[35.] \textit{Id.} at 276.
\item[36.] 508 U.S. 384 (1993).
\item[37.] \textit{Id.} at 387.
\item[38.] \textit{Id.}
\item[39.] \textit{Id.}
\item[40.] \textit{Id.} at 389. In viewpoint discrimination cases—especially those involving public schools—the type of forum involved is generally not highly disputed. Manning, \textit{supra} note 9, at 851.
\item[41.] \textit{Lamb’s Chapel}, 508 U.S. at 389.
\item[42.] \textit{Id.} at 390.
\item[43.] \textit{Lamb’s Chapel} v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 389 (2d Cir. 1992).
\item[44.] \textit{Lamb’s Chapel}, 508 U.S. at 392–93 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
\end{footnotes}
Second Circuit, holding that the "religious purposes" exclusion failed this test.\textsuperscript{45}

The Second Circuit mischaracterized the issue in holding that the exclusionary rule was viewpoint neutral since it would be applied to all groups seeking to use the school property for religious purposes.\textsuperscript{46} The proper inquiry, according to the Supreme Court, was "whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious viewpoint."\textsuperscript{47} The court reasoned that because presentations about family values and child rearing issues were clearly within the scope of permissible uses already allowed by the forum, the denial of the church's presentation was based solely on the fact that it was from a religious perspective.\textsuperscript{48} The court held this to be impermissible viewpoint discrimination, forbidden in a limited public forum setting.\textsuperscript{49} The court also rejected the school district's argument that this distinction was required to avoid violating the Establishment Clause.\textsuperscript{50}

C. Good News Club v. Milford Central School

Pursuant to state law, \textsuperscript{51} the school in \textit{Good News Club v. Milford Central School} \textsuperscript{52} adopted a policy of permissible uses for its facilities. \textsuperscript{53} Specifically, the policy made the school facilities available for "'social, civic, and recreational meetings and entertainments, and other uses pertaining to the welfare of the community.'"\textsuperscript{54} The policy, however, prohibited use "by any individual or organization for religious purposes."\textsuperscript{55}

The Good News Club, a Christian organization for children ages six to twelve, sought permission to use school facilities to hold its weekly afterschool meetings, which consisted of singing songs, saying prayers, hearing a Bible lesson, and playing games.\textsuperscript{56} The district superintendent

\begin{itemize}
  \item \textsuperscript{45} \textit{Id.} at 393.
  \item \textsuperscript{46} \textit{Id.}
  \item \textsuperscript{47} \textit{Id.}
  \item \textsuperscript{48} \textit{Id.}
  \item \textsuperscript{49} \textit{Lamb's Chapel}, 508 U.S. at 394 (citing \textit{Cornelius}, 473 U.S. at 806).
  \item \textsuperscript{50} \textit{Id.} at 395.
  \item \textsuperscript{51} N.Y. Educ. Law § 414 (McKinney 2000).
  \item \textsuperscript{52} 533 U.S. 98 (2001).
  \item \textsuperscript{53} \textit{Id.} at 98, 102.
  \item \textsuperscript{54} \textit{Id.} at 102.
  \item \textsuperscript{55} \textit{Id.} at 103.
  \item \textsuperscript{56} \textit{Id.}
\end{itemize}
reviewed the club’s activities and concluded that they “were not a discussion of secular subjects such as child rearing, development of character, and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself.”

Although the club was granted a preliminary injunction that allowed them temporary use of the facilities, this was eventually vacated, and Milford Central School was given summary judgment. A divided panel of the United States Court of Appeals for the Second Circuit affirmed, holding that, because the subject matter of the club’s activities was “quintessentially religious” and its activities fell “outside the bounds of pure ‘moral and character development,’” the school’s exclusionary policy was permissible content discrimination, not viewpoint discrimination.

Due to the parties’ stipulation, the United States Supreme Court analyzed the free speech issue in the context of a limited open forum. Finding the facts of this case indistinguishable from *Lamb’s Chapel* and *Rosenberger v. Rector and Visitors of University of Virginia,* the court determined that exclusion of the club was impermissible viewpoint discrimination. Since the forum had been opened to discussion of a wide variety of topics such as the teaching of morals and character development, as well as events pertaining to the welfare of the community, exclusion of the Good News Club—who also taught morals and character development—was based on the religious viewpoint it espoused.

The Supreme Court disagreed with the Second Circuit’s assessment that the club was “doing something other than simply teaching moral values.” The Supreme Court found that the Second Circuit erred in characterizing the Christian viewpoint as unique because it contains “an additional layer” that other viewpoints do not—“teaching children how to cultivate their relationship with God through Jesus Christ”—which the court called “quintessentially religious.” The Supreme Court further opposed the argument that something “‘quintessentially religious’ or

57. *Good News Club,* 533 U.S. at 104.
60. *Good News Club,* 533 U.S. at 106.
61. 515 U.S. 819 (1995) (holding that a university’s refusal to fund a student newspaper solely because the publication addressed issues from religious viewpoint violated the Free Speech Clause).
63. *Id.*
64. *Id.* at 111 (citing *Good News Club,* 202 F.3d at 510).
65. *Id.* at 111 (citing *Good News Club,* 202 F.3d at 509–10).
‘decidedly religious in nature’ cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.” 66 According to the Supreme Court, the incorrect “unstated principle” of the Second Circuit’s reasoning was “its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a ‘pure’ discussion of those issues.” 67 The Supreme Court reaffirmed its holdings in Lamb’s Chapel and Rosenberger that “speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.” 68 As such, Milford’s refusal to allow the club to use its facilities was impermissible viewpoint discrimination. 69 The court also rejected Milford’s contention that even if it had engaged in viewpoint discrimination, such action was necessary to avoid an Establishment Clause violation. 70

Justice Souter’s dissent described the club’s activities not as a “mere discussion of a subject from a particular, Christian point of view,” but as “an evangelical service of worship,” where the “unsaved” children are invited to receive Jesus as their savior from sin and the “saved” children are challenged to “ask God for the strength and the ‘want’ ... to obey him.” 71 In footnote four of the majority’s opinion, the court agreed that Justice Souter’s recitation of the club’s activities was accurate. 72 However, the majority responded that “regardless of the label Justice Souter wishes to use, what matters is the substance of the club’s activities, which we conclude are materially indistinguishable from the activities in Lamb’s Chapel and Rosenberger.” 73 In those cases, like in Good News Club, religion is the viewpoint or foundation from which the speaker’s ideas are conveyed. 74

66. Good News Club, 533 U.S. at 111 (citing Good News Club, 202 F.3d at 512 (Jacobs, J., dissenting)).
67. Id.
68. Id. at 112.
69. Id.
70. Id. The Court also noted that although in Widmar v. Vincent, 454 U.S. 263, 271 (1981), it had hinted that a state interest in avoiding an Establishment Clause violation “may be characterized as compelling” to the degree that it would justify content-based discrimination, the Court had not decided whether a state’s interest in preventing an Establishment Clause violation would justify viewpoint discrimination. The Court declined to answer that question here since it concluded that the school “has no valid Establishment Clause interest” that would justify the exclusion. Good News Club, 533 U.S. at 113.
71. Good News Club, 533 U.S. at 137–38 (Souter, J., dissenting).
72. Id. at 112 n.4 (majority opinion).
73. Id.
74. Id.
D. Bronx Household of Faith v. Community School District No. 10  
(Bronx Household I)

I. United States District Court for the Southern District of New York  
(1996)75

Pursuant to New York state law, 76 the Board of Education of the City of New York adopted standard operating procedures for the use of school buildings. Among the many permitted uses are “instruction in any branch of education” and “social, civic and recreational meetings . . . and other uses pertaining to the welfare of the community.” 77 In addition, the Standard Operating Procedures manual restricts use so that “no outside . . . group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside . . . groups after school for the purposes of discussing religious material or material which contains a religious viewpoint . . . is permissible.” 78

The Bronx Household of Faith sought to rent space in Anne Cross Merseau Middle School to hold Sunday morning worship 79 meetings consisting of “hymn singing, communion, Bible reading, Bible preaching and teaching.” 80 When its initial application to rent the school was denied in 1994 on the grounds that its intended use would violate the religious services and instruction policy, the church filed suit in the United States District Court for the Southern District of New York. 81

The court first concluded that the school had created a limited public forum. 82 In this context, the exclusionary policy was reasonably related to the school’s legitimate interest in “preserving and prioritizing access” to the school primarily for educational purposes, and secondarily, for public and community activities. 83 The district court granted summary judgment for the Board of Education and dismissed Bronx Household’s

77. Id.
of Educ., Standard Operating Procedures § 5.11 (formerly § 5.9)).
79. Id. at *2.
80. Bronx Household of Faith v. Cmty. Sch. Dist. No. 10 (Bronx Household I), 127 F.3d 207,  
211 (2d Cir. 1997).
82. Id. at *15.
83. Id. at *18.
complaint.\textsuperscript{84}

2. \textit{United States Court of Appeals for the Second Circuit (1997)}\textsuperscript{85}

After being dismissed in district court, the case went to the Second Circuit Court of Appeals where the district court's decision to dismiss the complaint was affirmed.\textsuperscript{86} The Second Circuit distinguished "between discrimination against speech because of its subject matter, considered permissible to preserve the purposes of the limited forum, and viewpoint discrimination, considered impermissible if directed against speech within the limitations of the forum."\textsuperscript{87} Thus, the court held that the exclusionary policy "preserves that distinction by prohibiting religious worship and religious instruction by outside groups, a prohibition that state authorities consider necessary to preserve the purposes of the limited public school forum, and by specifically permitting religious viewpoint speech in relation to matters for which the public school forum is open."\textsuperscript{88}

The court recognized that although a film like the one in \textit{Lamb's Chapel} would have been allowed under the use policy because it treats a subject already permitted in the forum, \textit{Lamb's Chapel} did not foreclose a school from limiting subjects in its forum as long as the restrictions were reasonable and viewpoint neutral.\textsuperscript{89} With that backdrop, the court found that the school acted reasonably in not wanting to be identified with a particular church.\textsuperscript{90} Also, the court held the exclusion to be viewpoint neutral because it had never opened the forum specifically to religious worship services.\textsuperscript{91} The court found it permissible to draw a distinction between religious worship/instruction on one hand, and discussion of secular subjects from a religious viewpoint on the other.\textsuperscript{92} In a petition to the United States Supreme Court, Bronx Household was denied certiorari.\textsuperscript{93}

\textsuperscript{84} Id. at *19.
\textsuperscript{85} Bronx Household I, 127 F.3d at 207.
\textsuperscript{86} Id. at 217.
\textsuperscript{87} Id. at 213.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 211–12.
\textsuperscript{90} Id. at 214.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 215.
E. Bronx Household of Faith v. Board of Education of the City of New York (Bronx Household II)


After the Supreme Court’s 2001 decision in Good News Club v. Milford Central School, 95 Bronx Household again applied to rent the school, and again its application was denied. 96 Accordingly, Pastors Hall and Roberts sought a preliminary injunction in district court, arguing that the Good News Club decision had overruled the Second Circuit’s ruling in Bronx Household I. 97 In this second proceeding, the Bronx Household provided more details about its intended use of the forum than in the previous litigation: “the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among the church members.” 98 As already shown, Bronx Household had previously requested that it rent the school for “hymn singing, communion, Bible reading, Bible preaching and teaching.” 99

Bronx Household also emphasized that it “seek[s] to give honor and praise to . . . Jesus Christ in everything we do. To that end we sing songs and hymns of praise to our Lord. We read the Bible and the pastors teach from it because it tells us about God, what He wants us to do and how we should live our lives.” 100 Finally, Bronx Household emphasized the importance of its Sunday morning meeting because “[i]t provides the theological framework to engage in activities that benefit the welfare of the community.” 101 The meeting allowed the church to reaffirm its commitment to help the needy among the community and their congregation and to provide counseling for those with problems. 102

In analyzing Bronx Household’s free speech claim, the court began

97. See id. at 411. As an interesting side note, Pastors Hall and Roberts commenced this action on September 10, 2001, the day before the tragic events at the World Trade Center in New York City. Although the court relies on the reasoning of the newly-decided Good News Club decision for its holding, the political and social climate of the time was certainly more favorable to religious groups than during the previous litigation when access was denied.
98. Id. at 410.
101. Id.
102. Id.
by noting that the Supreme Court in *Good News Club* specifically mentioned the *Bronx Household I* decision among the appellate court decisions that conflicted "'on the question of whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech.'"103 The Supreme Court in *Good News Club* had disagreed with the *Bronx Household I* court regarding the fact that the "'characterization of the club's activities as religious in nature warranted treating the club's activities as different in kind from the other activities permitted by the school.'"104 Striking down the Second Circuit's belief that a distinction could permissibly be drawn between religious worship services and other forms of speech from a religious viewpoint, the Supreme Court had called such attempts "'quixotic'" when the subject matter is character development and moral teaching.105 The school, in the context of a limited public forum, could not restrict activities that although "'quintessentially religious,'" were not '"mere religious worship, divorced from any teaching of moral values.'"106

The court found that, like the activities in *Good News Club*, the activities in *Bronx Household* could not be characterized as "'mere religious worship, divorced from any teaching of moral values,'" and as such could not be excluded from the limited public forum because of their religious nature.107 While the court noted that some of the church's activities, if conducted alone, such as communion or prayer, could be considered "'mere religious worship,'"108 the court declined to separate Bronx Household's individual activities into distinct speech categories.109 Instead, the court found that the church's activities were consistent with activities expressly permitted in the forum, such as "'social, civic, and recreational meetings ... and other uses pertaining to the welfare of the community.'"110 Such activities as providing the needy with food and clothing and counseling those with financial and emotional

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103. *Id.* at 413 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 105 (2001)).
104. *Id.* at 413 (quoting *Good News Club*, 533 U.S. at 110–11).
105. *Id.* at 413 (quoting *Good News Club*, 202 F.3d at 512 (Jacobs, J., dissenting)).
107. *Id.* at 414.
108. *Id.*
109. *Id.* at 413–15. Justice Stevens' dissent in *Good News Club*, 533 U.S. 98, 128–133 (2001), proposes separating religious speech into three categories: (1) religious speech that is simply speech about a particular topic from a religious point of view, (2) religious speech that amounts to worship, or its equivalent, (3) speech that is aimed principally at proselytizing or inculcating belief in a particular religious faith. Justice Stevens would find it permissible in a limited public form, such as was found in *Good News Club* and *Bronx Household of Faith*, to exclude the last two categories of speech, while allowing the first.
problems pertain to the welfare of the community.\footnote{111} Furthermore, singing, eating, and socializing are clearly recreational activities.\footnote{112} Teaching church members to “love their neighbors as themselves” and to help the poor can be fairly classified as teaching moral values.\footnote{113}

The court found these facts to be “squarely within the Supreme Court’s precise holding in \textit{Good News Club}: the activities are not limited to ‘mere religious worship’ but include activities benefiting the welfare of the community . . . and other activities that are consistent with the defined purposes of the limited public forum.”\footnote{114} The testimony of Pastor Hall that “the Sunday morning meeting . . . provides the theological framework to engage in activities that benefit the welfare of the community” shows that Bronx Household engaged in these permitted activities from a religious viewpoint.\footnote{115}

The court also rejected the school’s contention that worship is an activity different in kind from other activities allowed by the forum because it contains elements of ceremony and ritual that other activities do not.\footnote{116} Here, the court observed that many permitted groups that use the facilities to convey particular viewpoints, such as the Boy Scouts and Legionaries, employ ceremony and ritual during their meetings.\footnote{117} Finally, the court commented that even if worship were an activity different in kind from other activities permitted in the forum, an attempt to distinguish between religious content and viewpoint where morals and the welfare of the community is involved is not only “quixotic,” but also raises issues of excessive government entanglement with religion.\footnote{118} The district court granted a preliminary injunction against the school to prevent them from denying Bronx Household use of the facilities to conduct their worship services.\footnote{119}

\section*{2. United States Court of Appeals for the Second Circuit (2003)}\footnote{120}

Following the district court’s preliminary injunction, the Board of Education appealed to the Second Circuit Court of Appeals.\footnote{121} After

\begin{footnotes}
\item[112] \textit{Id.}
\item[113] \textit{Id.} at 414.
\item[114] \textit{Id.} at 414–15.
\item[115] \textit{Id.} at 415.
\item[116] \textit{Bronx Household of Faith}, 226 F. Supp. 2d at 415.
\item[117] \textit{Id.} at 416–17.
\item[118] \textit{Id.} at 421–23.
\item[119] \textit{Id.} at 427.
\item[120] \textit{Bronx Household of Faith v. Bd. of Educ. (Bronx Household II)}, 331 F.3d 342 (2d Cir. 2003).
\item[121] \textit{Id.} at 346.
\end{footnotes}
reciting the extensive procedural history of the *Bronx Household* case, the court again analyzed the church’s claim that the school had violated its Free Speech rights under the First Amendment by excluding a group seeking to rent the school premises for purposes of “religious services or instruction,” while allowing most other community groups to rent the school. Since the Board of Education appealed from a grant of a preliminary injunction by a trial court, the court reviewed the trial court’s decision to determine whether it had abused its discretion.

The court ultimately agreed with the trial court that the plaintiffs were likely to establish that the defendants violated their First Amendment Free Speech rights because of the factual parallels between the activities in *Good News Club* and the activities at issue in this case. The court noted that “the majority in *Good News Club* characterized the club’s activity as ‘the teaching of morals and character from a particular viewpoint,’ but also agreed with Justice Souter’s characterization of the club’s activities as involving not only teaching but also an ‘evangelical service of worship.’” In prohibiting the exclusion of the club from the forum as a violation of the Free Speech clause, the majority simply observed that the activities at issue were not “mere religious worship, divorced from any teaching of moral values.”

Determining that Bronx Household’s activities were more than just worship, the court found that there was “no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed for its Sunday meetings” at the school. Like the Good News Club, Bronx Household “combine[d] preaching and teaching with such ‘quintessentially religious’ elements as prayer, the singing of Christian songs, and communion.” The church’s meetings also contained secular elements like the fellowship meal, which gave members a chance to discuss individual problems and needs. On the basis of these facts, the court concluded that “it cannot be said that the meetings of the Bronx Household constitute only religious worship, separate and apart from any

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122. Id. at 345–47.
123. Id. at 353 57.
124. Id. at 348.
125. Id. at 354.
126. Id. (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001)).
127. Id. (quoting *Good News Club*, 533 U.S. at 138 (Souter, J., dissenting)).
128. Id. (quoting *Good News Club*, 533 U.S. at 112 n.4 (majority opinion)).
129. Id.
130. Id.
teaching of moral values.” Since the Board of Education had allowed other groups to teach moral and character development on school grounds, it could not exclude the church from its forum on the ground that those same topics were being presented from a religious viewpoint.

In concluding the discussion of Bronx Household’s Free Speech claim, the court noted several unresolved issues that remain in the wake of Good News Club:

1. Would [a court] be able to identify a form of religious worship that is divorced from the teaching of moral values? (2) Should [a court] continue to evaluate activities that include religious worship on a case-by-case basis, or should worship no longer be treated as a distinct category of speech? (3) How does the distinction drawn in . . . earlier precedent between worship and other forms of speech from a religious viewpoint relate to the dichotomy suggested in Good News Club between “mere” worship on the one hand and worship that is not divorced from the teaching of moral values on the other? (4) How would a state, without imposing its own views on religion, define which values are morally acceptable and which are not? And, if such a choice is impossible to make, would the state be required to permit the use of public school property by religious sects that preach ideas commonly viewed as hateful? (5) When several religious groups seek to use the same property at the same time, would not the state have to choose between them? What criteria would govern that choice? (6) In all of this process, is there not a danger of excessive entanglement by the state in religion?

Finally, the court concluded by rejecting the Board of Education’s argument that Bronx Household’s exclusion from the forum was necessary to prevent an Establishment Clause violation. The court relied on the Supreme Court’s failure to find a valid Establishment Clause interest as evidence of a similar lack of interest in Bronx Household, noting again the factual similarities between this case and Good News Club.

In his dissenting opinion, Justice Miner criticized the majority’s conclusion that, based on the facts presented by Bronx Household’s pastors, “it cannot be said that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any
teaching of moral values." Justice Miner reasoned that the majority relied on evidence produced in a “self-serving” letter and affidavit prepared by Bronx Household’s pastors. This letter, which Justice Miner hinted was carefully crafted with the assistance of counsel, “tellingly decline[s] to mention the church’s intent to use [school facilities] for worship services and instead attempts to persuade the reader that the church’s proposed use... [involved] instruction from a ‘religious viewpoint.’” According to the dissent, the court should have weighed the facts produced in Pastor Hall’s deposition that “put to rest any doubts about whether the church’s proposed meetings are anything but religious worship services.” Pastor Hall’s deposition gives more detail about the structure of the Sunday services, the administration of communion, and the purpose of the meetings. Based on Pastor Hall’s deposition, the dissent found the facts of this case “as different from Good News Club as night from day.”

The dissent also agreed with the Bronx Household I holding, that “religious worship services could be prohibited from being held in public school buildings without running afoul of the Free Speech Clause remains good law.” In the dissent’s view, the Supreme Court’s ruling that “constitutionally meaningful distinctions could not be drawn between religious and secular viewpoints in the context of religious instruction” did not disturb the Bronx Household I holding. According to the dissent, the Good News Club opinion did not address the religious worship question at issue here, and instead confined its analysis to the question of whether a group seeking to engage in religious instruction could be excluded from a limited public forum.

The dissenting opinion concluded with Justice Miner emphasizing that he agreed with the majority’s finding that a religious group wanting to teach moral and character development and desiring to hold meetings designed to benefit the welfare of the community, should not be excluded on the basis of its religious viewpoint, if the forum has allowed other groups to conduct the same activities. However, he stated that he

136. Id. at 360 (Miner, J., dissenting).
137. Id.
138. Id.
139. Id.
140. Id. at 360-61.
141. Id. at 365 (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 91, 137 (2001) (Souter, J., dissenting)).
142. Id. at 364-65.
143. Id.
144. Id.
145. Id. at 366.
cannot abide the majority’s leap of logic based on the [Church’s] self-serving statements that “their teaching comes from the viewpoint of the Bible” and their emphasis on the social and community aspects of the “meetings” of the church, their religious worship services are suddenly transformed into speech from a religious viewpoint. 146

The dissent would hold that Bronx Household’s activities were religious worship—“nothing more and nothing less”—and that its activities could still be excluded from a limited public forum following the Good News Club decision. 147 Finally, the dissent raised concerns about a possible Establishment Clause violation if Bronx Household were allowed to hold its worship services on the school property. 148

III. UNRESOLVED QUESTIONS

Although the Bronx Household II opinion presents several questions for reflection, many of those questions are simply different ways of characterizing the first inquiry presented in Good News Club: “Would [a court] be able to identify a form of religious worship that is divorced from the teaching of moral values?” 149 Presumably, this question raises the issue of whether, based on the facts of a particular case, a court could identify “pure” religious worship that is divorced from the teaching of moral values, and thus constitutionally permit its exclusion from a limited public forum on the basis of its content. The Bronx Household court’s apparent confusion on this issue stems from Justice Thomas’s vague language in the Supreme Court’s Good News Club decision. 150 Although the Bronx Household II court professed to be unclear on this issue, 151 analyzing the court’s reasoning and holding in light of the Good News Club decision shows that the Second Circuit’s purported confusion is somewhat unfounded. If the Bronx Household II court felt in some way “unguided” by Supreme Court precedent on this issue, its opinion does not appear to reflect this feeling of uncertainty.

This question of identifying religious worship divorced from moral

146. Id.
147. Id.
148. Id. at 366–67.
149. It is interesting to note that the court, as evidence of the complexity of the issues that it is unable to resolve, pairs this question with such obviously unanswerable philosophical queries as, “How would [a] state, without imposing its own views on religion, define which values are morally acceptable and which are not?” Id. at 355.
150. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 n.4 (2001). The fact that Justice Thomas’s vague language was found in a footnote instead of the body of the opinion may have further contributed to the court’s confusion about how much weight to give his statements.
151. Bronx Household II, 331 F.3d at 355.
values comes from the majority's holding in *Good News Club.* In that case, the Supreme Court found the Christian Club's social, moral, and religious activities to be indistinguishable from those in *Lamb's Chapel* and *Rosenberger* because the club sought to address an otherwise permissible subject—the teaching of morals and character—from a religious viewpoint. Disagreeing with the Second Circuit Court of Appeals that "something that is 'quintessentially religious'... cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint," the Supreme Court concluded that "the club's activities do not constitute mere religious worship, divorced from any teaching of moral values." Because the activities were not merely worship, the club's exclusion from the limited public forum was impermissible viewpoint discrimination.

This conclusion by the Supreme Court is most significant for its implied message. Here, the court seems to be saying that had the club engaged in activities that could be characterized as "'mere religious worship, divorced from any teaching of moral values,'" a valid distinction could be drawn between pure religious worship and the expression of a religious viewpoint on otherwise permissible subjects. This would allow a court to exclude a group intending to use a limited public forum for worship on the basis of its content as long as religious worship had never been permitted in the forum. In practical application, however, is it possible to distinguish between religious viewpoint and worship? If it is possible to draw a distinction, would a court be willing to do so? As shall be discussed below, the *Bronx Household II* opinion indicates that the court has already answered its own questions—it is neither possible nor likely.

*A. Bronx Household II Reasoning and Analysis*

1. District Court

The district court in the initial *Bronx Household I* case held the school district's restrictions on religious worship to be both reasonable

152. *Good News Club,* 533 U.S. at 112 n.4.
153. Id. at 110–12. The fact that the club's activities were, according to the dissent and acknowledged by the majority, an "evangelical service of worship" had no bearing on the overall issue of whether the activities could be excluded from the forum. *Id.* at 138.
154. *Id.* at 111.
155. *Id.* at 112 n.4.
156. *Good News Club,* 533 U.S. at 112.
157. See Manning, supra note 9, at 870.
158. See id.
and viewpoint neutral. With respect to viewpoint neutrality, the court drew a line between speech from a religious viewpoint, which the policy specifically allowed, and religious worship services, which had never been allowed in the forum. Although the court recognized that religious worship services may be considered the ultimate form of speech from a religious viewpoint in an open forum, in the context of a limited public forum, a permissible distinction could be drawn between speech from a religious viewpoint and religious worship. In the court’s view, exclusion of religious worship services would be content discrimination, which is allowed in a limited public forum, and not impermissible viewpoint discrimination.

The court not only found this distinction to be reasonable and viewpoint neutral, but it also found it easy to make the distinction between discussions of secular matters from a religious viewpoint—a characterization that presumably comes from its interpretation of the Supreme Court’s holding in Lamb’s Chapel—and religious worship. Thus, the court would restrict a religious group’s use of the school’s facilities to presentation of secular matters from a religious viewpoint, rather than more directly religious viewpoints—including that of worship—on both religious and secular subjects.

Following the Supreme Court’s 2001 decision in Good News Club, the district court began to sing a different tune regarding the distinction between religious worship and the presentation of religious viewpoints. Reviewing the Bronx Household I decision in a case involving the same issues and parties, the district court in Bronx Household II reached the opposite conclusion. In so doing, the Bronx Household II court demonstrated the reality and force of the Good News Club’s implied message that although it might be possible in theory to find a form of

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160. See id. at 214. The court found that it was reasonable for a state and school district to adopt a regulation that would avoid identifying a middle school with a particular church because of the consequences it would have on the minds of the children. Additionally, the court believed it to be a proper state function to decide the extent to which the school and church groups should remain separate. Id.
161. Id. at 215.
162. Id.
163. Bronx Household I, 127 F.3d at 215. Even Judge Cabranes, the sole dissenter from the three-judge panel, would uphold the ban on religious worship because such activity cannot be properly understood to be a vehicle for the presentation of both secular and religious viewpoints and is therefore a form of content exclusion, permissible in a limited public forum. Id. at 221 (Cabranes, J., dissenting).
164. Id. at 214.
religious worship that is divorced from the teaching of morals and character, in practice a court’s ability and willingness to make this distinction is not only unlikely, but rather “quixotic.” Judge Jacob’s Second Circuit dissent in Good News Club articulates this principle and demonstrates why its application to complex real-life situations is so difficult:

The majority argues that the activities of the club are “quintessentially religious,” while the other groups deal only with the “secular subject of morality.” The fallacy of this distinction is that it treats morality as a subject that is secular by nature, which of course, it may be or not, depending on one’s point of view. Discussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially—quintessentially—religious. “There is no indication when ‘singing hymns, reading scripture, and teaching biblical principles’ cease to be ‘singing, teaching, and reading’—all apparently forms of ‘speech,’ despite their religious subject matter—and become unprotected ‘worship.’”

Even the idea of being able to identify “in theory” a form of religious worship divorced from moral and character development is problematic. For example, would a group that desired to use Milford Central School’s facilities to hold a simple prayer appealing to a higher being for assistance or to give thanks be excluded under the Good News Club holding? What about a group whose only activity consists of serving communion or performing a baptism? Because these activities do not expressly teach a moral lesson, a court might find that they constitute “pure worship,” divorced from the teaching of moral values or character. However, it certainly could be argued that these forms of religious activities, although not expressly teaching moral or character development, could nevertheless serve as the foundation for the teaching of moral values or character development. In the alternative, mere acknowledgement of a higher being or a person’s dependence on such could of itself be considered a moral lesson.

167. Id. at 515 (quoting Widmar v. Vincent, 545 U.S. 263, 269 n.6 (1981) (internal citation omitted)).
168. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001) (“What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.”).
169. Judge Jacob’s Second Circuit dissent in Good News Club acknowledged the difficulty in
This approach is also problematic in the sense that it would require a court to determine on behalf of a religious group, in a way that is potentially contrary to the religious group’s own sincerely held views, which forms of worship are cleanly separated from the teaching of moral values. For most groups and activities, it is safe to assume that such clean breaks cannot be readily made. If the group itself could not make this distinction, it is doubtful that a court, guided only by the limited perspective of written briefs and condensed oral arguments, could fairly make the distinction. Justice Souter’s concurring opinion in *Lee v. Weisman*, a school prayer case, succinctly evaluates this concern: “I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible...[than] comparative theology.” Rather than risking mistake, most courts will likely choose to “err on the side of free speech,” as was the case in *Bronx Household II*. 

Another related difficulty in making fine distinctions between worship and presentation of religious viewpoints—made very clear in the *Bronx Household II* opinion—results from the inherently broad and variable definition of worship itself. For example, although worship commonly connotes a religious activity, Pastor Hall, from The Bronx Household of Faith, presented a different perspective in his deposition to the court. Pastor Hall acknowledged that “worship” is often linked to religious activity, but is not necessarily exclusively religious in nature. In his view (and presumably that of many members of his congregation), worship is a “neutral” word, having neither a solely religious nor solely irreligious meaning; worship simply means “to ascribe worth to something.”

Used in the more neutral sense, Pastor Hall found no difficulty in stating that he worships athletic prowess, masterful works of art, and beautiful displays of nature, along with his “traditional” worship of Jesus.
Here again, the difficulty courts have in dissecting the religious speech at issue is obvious. Worship—a seemingly clear term—is not so clear after all in the context of individuals' particular religious views. On these grounds, the district court in Bronx Household II concluded that even if it were possible to distinguish religious viewpoint and religious worship, a court should not become entangled in such subjective and ultimately unsatisfactory endeavors.\(^{178}\)

In any event, the Bronx Household II court's interpretation of Good News Club has made these fine speech distinctions now nearly irrelevant. The Bronx Household II court adopted not only the Good News Club majority's position but also the consequences of the rule's practical application; it is now nearly impossible for a court to distinguish between religious worship that contains moral and character development and worship that does not.\(^{179}\) The effect of this is to ensure that all religious groups—even those seeking to use the forum for "quintessentially" religious purposes or for "pure worship"—must be allowed to participate in the limited public forum once it has been opened generally for moral and character development, activity pertaining to the welfare of the community, or any other enumerated forum purpose that might reasonably be paired with the religious worship.\(^{180}\)

The practical effect of the Good News Club court's reasoning is evident from the holding and reasoning of the Bronx Household II opinion. The district court in Bronx Household II began its analysis by noting that the Supreme Court mentioned the Second Circuit in Bronx Household I as one of the courts conflicted on the issue of whether speech can be excluded from a limited public forum because of the religious nature of the speech.\(^{181}\) The Supreme Court then disagreed with the Second Circuit's reasoning in Bronx Household I that characterizing activities as religious in nature warranted treating the activities differently than secular activities.\(^{182}\) Additionally, the Supreme

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177. Id.
178. Id. at 423.
180. See Austin W. Bramwell, Juris Doctores or Doctores Divinitatis: Good News Club v. Milford Central School, 533 U.S. 98 (2001), 25 HARV. J.L. & PUB. POL'Y 385, 391 (2001). Although not addressed in this paper, the Bronx Household II court's concern over whether groups whose views are commonly viewed as hateful may be allowed to use the forum for expressive purposes comes into play. It would certainly seem that if a group could correlate its activity to a permitted forum purpose, it could strongly argue that its exclusion would be on the basis of viewpoint. See Bronx Household II, 331 F.3d at 355.
182. Id. (quoting Good News Club, 533 U.S. at 110–11).
Court did not think it plausible to draw a distinction between religious worship services and other speech from a religious viewpoint.\textsuperscript{183}

The majority obviously was aware of, but rejected, Justice Stevens’s dissent in \textit{Good News Club}, which would have permitted a court to dissect the religious speech at issue and categorize it according to its nature and purpose.\textsuperscript{184} Allowing the court to carefully scrutinize religious speech, in his view, was especially appropriate in a school setting.\textsuperscript{185} Justice Stevens saw no problem with letting a public school limit the scope of the forum it had created by excluding speech that is essentially “worship” or “proselytizing” in nature.\textsuperscript{186} The rejection of Justice Stevens’s proposal sent a strong message (or at least was apparently a clear indication) to the \textit{Bronx Household II} court, which faithfully applied the message in its subsequent rulings: when the speech at issue is religious, a court should not attempt to dissect or compartmentalize the speech in a way that separates religious worship from religious viewpoint.\textsuperscript{187}

Following the \textit{Good News Club}’s reasoning, the district court in \textit{Bronx Household II} also declined to dissect speech and classify it according to its religious nature.\textsuperscript{188} The court pointed out that some of the Bronx Household’s activities, like prayer and communion, could arguably be termed “mere religious worship,” but nevertheless noted that some of the church’s other activities, such as teaching its members to love one another and helping its members and others in the community to abandon destructive lifestyles, were clearly consistent with the limited forum’s express allowance of uses pertaining to the welfare of the community.\textsuperscript{189} Not willing to separate the two forms of expression, the court essentially held that as long as a religious group could ground its “pure worship” in some permissible forum purpose, both forms would be allowed.\textsuperscript{190}

\textsuperscript{183} \textit{Id.} (quoting \textit{Good News Club}, 533 U.S. at 111).

\textsuperscript{184} See \textit{Good News Club}, 533 U.S. at 130–34 (Stevens, J., dissenting); see also supra note 109. Justice Stevens’s dissent also recognized that while the government may not restrict speech about an authorized topic based on the speaker’s viewpoint, it has broad discretion to preserve the property for its intended use by enforcing content restrictions. \textit{Good News Club}, 533 U.S. at 130–31 (Stevens, J., dissenting) (citing \textit{Greer v. Spock}, 424 U.S. 828, 836 (1976)).

\textsuperscript{185} \textit{Good News Club}, 533 U.S. at 133.

\textsuperscript{186} \textit{Id.} at 130.

\textsuperscript{187} Justice Scalia’s concurring opinion in \textit{Good News Club} also noted that the Supreme Court has “previously rejected the attempt to distinguish worship from other religious speech” since “the distinction has [no] intelligible content,” and . . . no ‘relevance’ to the constitutional issue.” \textit{Id.} at 126 (Scalia, J., concurring) (quoting \textit{Widmar v. Vincent}, 454 U.S. 263, 269 n.6 (1981)).


\textsuperscript{189} \textit{Id.}

\textsuperscript{190} The court emphasized that a “moral” purpose was not necessarily required to prevent the
As further evidence of the court’s unwillingness to dissect or carefully scrutinize the religious speech at issue, the Bronx Household II court also rejected, as being precluded by Good News Club, the School District’s argument that Bronx Household’s overall activity, when viewed as a whole, was essentially worship because all of the church’s individual proposed activities, whether marginally worship or entirely worship, were “linked by the overarching purpose of religious worship.” The court noted, as was emphasized in Good News Club, that decidedly religious or “quintessentially religious” activities should not be treated any differently for purposes of viewpoint neutrality analysis than other permitted activities. Again, the message is clear that no form of religious activity or speech may be excluded because of its substance or nature so long as it is grounded in some permissible forum purpose.

2. Second Circuit Court of Appeals

In a brief opinion, the Second Circuit Court of Appeals affirmed the trial court’s granting of a preliminary injunction to Bronx Household on the grounds that the church was “substantially likely to establish that defendants violated their First Amendment free speech rights.” The court found the district court’s reliance on the reasoning of Good News Club to be sensible since it found “no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that the Bronx Household of Faith has proposed for its Sunday meetings.” Both groups’ activities combined preaching and teaching with “quintessentially religious” elements like prayer and hymns.

exclusion of the religious worship from the forum. As long as the worship is coupled with an activity included in the forum’s permitted uses, the inclusion would comport with the Good News Club reasoning. Id. at 415 n.8.

191. Id. The majority also rejects the argument that worship can easily be identified by the usual characteristic of having ritual or ceremony. Even assuming that fact were true, groups such as the Boy Scouts and Legionnaires use ceremony and ritual as the foundation for their viewpoints. Id. As such, if the church’s exclusion was based on its use of ceremony and ritual, it was only because it was religious in nature—which is clear viewpoint discrimination. Id. at 416–17. See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (Scalia, J., dissenting).

192. Bronx Household of Faith, 226 F. Supp. 2d at 416 (quoting Good News Club, 533 U.S. at 111). The court also notes that such an argument had already been rejected by the court in Widmar v. Vincent, where the majority specifically rejected the dissent’s view that a class of unprotected religious speech called “worship” should be created. Id. (citing Widmar, 454 U.S. at 270).


194. Id.

195. Id.
Viewing the similarity between the facts of this case and those of *Good News Club* to be dispositive, the court only found it necessary to explicitly affirm the district court’s finding that Bronx Household’s activities, like those of the Good News Club, were not religious worship divorced from the teaching of moral values or other permitted subjects. As such, it could not be excluded from the limited public forum on the basis of the religious viewpoint it espoused. Although the court declined to address the district court’s determinations that (1) after *Good News Club*, religious worship cannot be treated as an inherently distinct activity, and (2) the distinction between religious speech and worship cannot meaningfully be drawn by the courts, the court did acknowledge that its previously held view to the contrary in *Bronx Household I* was “seriously undermined” by the *Good News Club* decision.

The court’s refusal to review the district court’s findings in these two areas may be a proper use of judicial restraint, but the issues, whether the court chooses to formally address them or not, have already been decided in previous Supreme Court decisions, at least in practical effect. On the basis of these decisions, the district court in *Bronx Household II* had no trouble deciding that religious worship cannot be treated as an activity inherently different from other forms of expression. Likewise, the *Good News Club* opinion and its application in *Bronx Household II* demonstrate that courts are neither well-equipped nor any longer permitted to dissect and categorize religious speech.

The Supreme Court addressed the issue of whether worship can be treated as an inherently distinct activity in *Good News Club*. In looking at this question, it is important to remember that the issue presented in that case was whether “speech can be excluded from a limited public forum on the basis of the religious nature of the speech.” In answering in the negative, the Supreme Court specifically disagreed with the Second Circuit Court of Appeals that “characterization of the club’s activities as religious in nature warranted treating the club’s activities as different in kind from other activities

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196. *Id.*
197. *Id.*
198. *Id.* at 355.
199. *Id.* at 357.
202. *Id.* at 105.
permitted by the school.” The Supreme Court also termed the Second Circuit’s attempt in *Bronx Household I* to distinguish between religious viewpoint and worship when morals and character are involved as “quixotic.” Ultimately, the court found no difference between quintessentially religious activities such as worship and secular activities.

Twenty years earlier, in *Widmar v. Vincent*, the Supreme Court addressed the issue of whether courts may draw a meaningful distinction between religious speech and worship. In that case, the court explicitly recognized that worship is a form of speech protected by the First Amendment. In so doing, it rejected the dissent’s argument to the contrary, which would have created a “new [unprotected] class of religious ‘speech’ . . . constituting ‘worship.’” The majority believed the dissent’s proposed plan to be unworkable because there was no indication of when indisputably religious speech such as prayer ceases to be “just prayer” and becomes unprotected worship.

This conclusion’s continuing validity is evidenced by the majority’s rejection of the dissenting opinions in *Good News Club*, which would have allowed courts to carefully scrutinize and categorize the religious speech at issue, separating viewpoint from worship. Furthermore, the majority’s description of the club’s activities, in generic and broad terms, shows the court’s reluctance to determine “at what point religious content [, like worship,] becomes religious viewpoint.”

203. Id. at 110–11.
204. Id. at 111 (quoting *Good News Club*, 202 F.3d at 512 (Jacobs, J., dissenting)).
207. Id. at 270.
208. Id. at 269 n.6.
209. See *id.*; see also *Good News Club v. Milford Cnt. Sch.*, 533 U.S. 98, 126 (2001) (Scalia, J., concurring). A possible distinction between *Widmar* and the *Bronx Household II* decisions is the differing fora in the two cases. The *Widmar* court analyzed the free speech issue in light of a “generally open forum,” *Widmar*, 454 U.S. at 269, while the *Bronx Household II* court looked at it in light of a limited public forum. *Bronx Household of Faith v. Bd. of Educ.*, 226 F. Supp. 2d 401, 413 (S.D.N.Y. 2002). However, the *Good News Club* court analyzing the free speech issue in the context of a limited open forum also implicitly reached a similar conclusion in its rejection of Justice Stevens’s dissent. See *Good News Club*, 533 U.S. at 177 (Stevens, J., dissenting); Manning, supra note 9, at 871–72.
210. *Gastel*, supra note 9, at 182. The author finds the majority’s reluctance to draw this line problematic because not only is the court “in the business of line drawing,” but Justice Stevens’s dissent proposes an intriguing scheme in which to do so.
211. Id. at 181.
overgeneralization of facts and the court’s refusal to draw the line between religious viewpoint and content, such as worship, suggests the Supreme Court’s willingness to provide increased protection to all forms of speech, and specifically religious speech. 212 Finally, the Supreme Court’s familiar adage again rings true that even if it were possible to draw this line, courts are not properly suited to make these fine distinctions. Such judicial scrutiny of religious words and practices would “inevitably... entangle the state with religion in a manner forbidden by our cases.” 213

IV. CONCLUSION

The Supreme Court’s precedents in the area of limited speech in public fora over the last twenty-five years show the court’s increasing willingness to grant First Amendment Free Speech rights to religious groups, even in such traditionally protected areas as public schools. Although the court started modestly in Widmar by merely allowing equal access to religious groups when a forum had been generally opened for expression, the subsequent cases gradually began to expand the scope of expressive and religious freedom for after-school groups using public school facilities. Good News Club marked the culmination of this expansion of religious freedom when the Supreme Court redrew the lines separating church and state and effectively gave religious groups free reign to hold meetings and conduct “quintessentially religious” activities such as worship on state-owned property.

If the Supreme Court did not mean to extend the rights of Free Speech as far as it did in Good News Club, it must clarify the issues that the Bronx Household II court found to be confusing. Otherwise, as the Bronx Household II opinion shows, lower courts will interpret the Good News Club holding broadly and grant all religious groups access to a limited public forum as long as they can pair their “quintessentially religious” activities with some permissible forum purpose. In practical effect, lower courts will no longer attempt to distinguish religious worship from the presentation of religious viewpoint. Whether this will positively or negatively impact church-state relations remains to be seen. What is clear, however, is that lines between them have been redrawn in a way that will affect the American public.

Kevin Fiet

212. Id.
213. Widmar, 454 U.S. at 269 n.6.